STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE Y. POWELL,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

and

ROBIN PRATT, also known as ROBIN PRATT STEPHENS, BURNIE STEPHENS, and DARYL TERRY,

Defendants.

UNPUBLISHED
February 21, 2003

No. 233557
Jackson Circuit Court
LC No. 98-088818-NO

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff Michelle Powell appeals by leave granted the trial court's order granting summary disposition to defendant Michigan Department of Corrections (MDOC) pursuant to MCR 2.116(C)(10). The trial court determined that Powell had failed to show that a genuine issue of material fact existed regarding MDOC's liability for sexual harassment she experienced in the course of her employment at the state prison in Jackson. We affirm.

I. Basic Facts And Procedural Background

Powell began working as a corrections officer with MDOC in August 1989. Throughout her eight-year tenure with MDOC, Powell occasionally worked with Sergeants Burnie Stephens and Daryl Terry. Stephens and Terry filled the position classified as Corrections Shift Supervisor IV and were authorized to perform general supervisory duties that included initiating disciplinary action against employees under their supervision. Powell disliked working with Stephens and Terry because, she claimed, both men had engaged in unwelcome sexual conduct with her. However, Powell stated she was fully aware of MDOC's policies regarding sexual harassment and the available methods of reporting harassment but had not reported Stephens or Terry for these past incidents. In fact, Powell had previously filed two formal complaints against MDOC other than those involved in the present case.

The events of Powell's shift on April 29, 1997, form the basis of her quid pro quo and constructive discharge claims. According to Powell, although they were unsuccessful in achieving their specific goal, that day Stephens and Terry conspired to place her in a position where Stephens could sexually assault her while Terry kept watch. On April 29, Powell's

contact with Terry was limited to his failed attempts at the beginning of the shift to convince her to come to his "office," a vacant room in an area of the prison where female corrections officers were not allowed to work. Powell claimed that Terry's attempts to lure her to his office were evidence of the conspiracy to isolate her from other employees so that Stephens could rape her while Terry kept watch.

On April 29, Powell's assignment periodically placed her in an office with Stephens and two other corrections officers. All four individuals frequently visited the office throughout the shift. According to Powell, throughout the day Stephens slapped her buttocks, slid his hand up her leg and stroked her crotch, exposed and stroked his penis, attempted to place his penis in her hand, and asked her to put her mouth on his penis. He also commented on various portions of her anatomy and repeatedly expressed his desire to "bend her over," "taste her," and "stick it in her butt up to her stomach." Powell said that Stephens put his hand in her pants and inserted his finger in her vagina shortly before her shift ended.

Powell called the prison on April 30, 1997, and spoke to corrections officer Willie Allen about Stephens' conduct the previous day. Allen reported the telephone call to his supervisor, Captain Robert Hughes, who instructed Powell to report to his office on May 2, 1997, her next scheduled day to work. Hughes immediately telephoned Cynthia Acker, an MDOC sexual harassment coordinator, and Acker arrived at the prison before 7:00 a.m. to speak with Powell. After she advised Powell to file a written complaint against Stephens and Terry, Acker contacted Warden Jerry Herbier, who immediately suspended Stephens and Terry pending the outcome of an investigation by Arden Mellberg, who had been assigned to the investigation by a regional prison administrator. After conducting a thorough investigation, Mellberg concluded that Powell's allegations were "reliable and credible" and that other MDOC employees substantiated the details of her complaint. Following individual disciplinary conferences, Stephens and Terry were separated from their employment with MDOC on August 25 and August 14, 1997, respectively. Stephens was later convicted of criminal sexual conduct charges arising from Powell's allegations; his appeal of the conviction was dismissed by stipulation.

Powell did not return to work after April 29, 1997, and in May 1998, MDOC personnel notified her that she had exhausted the maximum allowable leave time and had to apply for a waived-rights leave of absence, return to work, or voluntarily resign her employment with MDOC. Powell returned to work on June 9, 1998, but was sent home because she could not perform her duties. Though MDOC personnel again notified Powell of the three options available to her, she did not take advantage of any of them, and MDOC separated her from its employ on July 9, 1998.

This case's lengthy procedural history included MDOC's interlocutory appeal to this Court after the trial court denied its motion to bar Powell from reinstatement and front-pay based on after-acquired evidence of misconduct for which MDOC claimed she would have been terminated. On appeal, this Court reversed the trial court's decision. Subsequently, the trial court heard the parties' oral arguments on MDOC's motion for summary disposition and held its ruling in abeyance until the discovery period had expired. At a hearing held after discovery closed, the trial court granted MDOC's motion in its entirety, which disposed of all Powell's claims against MDOC.

II. Standard Of Review

Powell argues that the trial court erred when it dismissed her quid pro quo and hostile environment sexual harassment claims by granting MDOC's motion for summary disposition. This Court reviews de novo a trial court's order granting summary disposition.[1]

III. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.[2] When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.[3] The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial.[4]

IV. Quid Pro Quo

Michigan's Civil Rights Act[5] (CRA) prohibits an employer from discriminating against an employee "because of" "sex."[6] The CRA defines sexual harassment as a form of sex discrimination, explaining that

> [s]exual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . .
>
> (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment . . . .
>
> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.[7]

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] *Id*.

[3] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

[4] *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

[5] MCL 37.2101 *et seq*.

[6] MCL 37.2102(1).

[7] MCL 37.2103(i).

"Sexual harassment that falls into one of the first two of these subsections is commonly labeled quid pro quo harassment. Sexual harassment that falls into the third subsection is commonly labeled hostile environment harassment."[8] Powell's quid pro quo claim implicates the second subsection.

To establish a claim of quid pro quo sexual harassment, Powell had to demonstrate a genuine issue of material fact concerning her prima facie case, which consisted of two elements: "'(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment.'"[9] An employer's suggestion that it cannot be liable for a supervisor's conduct because it did not authorize the supervisor's behavior requires a "construction of agency principles . . . far too narrow."[10] That argument "fails to recognize that when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority."[11] The Restatement of Agency imposes liability on the master for his servant's torts when "'the servant was aided in accomplishing the tort by the existence of the agency relation.'"[12] Therefore, because "the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment," an employer is strictly liable for those claims.[13]

MDOC does not dispute that Powell satisfied the first element of her prima facie quid pro quo claim. There is no question from the existing record that the verbal and physical conduct to which she was subjected was unwelcome and prohibited under the CRA. However, Powell failed to show any material dispute regarding MDOC's vicarious liability for the conduct of Stephens and Terry. The problem in the record revolves around the second element. Powell has not shown that her "submission to or rejection of unwelcome sexual conduct or communication"[14] from Stephens and Terry, who were MDOC's agents, played any adverse role in a decision "'affecting'" her employment.[15] As MDOC points out, neither Stephens nor Terry had the amount of actual authority over Powell that has been the basis of vicarious liability for quid pro quo sexual harassment in other cases.[16] Stephens and Terry were employed as Corrections Shift Supervisors IV, and had the ability to initiate disciplinary action, but not to hire, fire, transfer, or promote Powell. Additionally, and critically, Powell has not provided any evidence that either man used or threatened to use whatever authority he had over her to make

[8] *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000) (citations omitted).

[9] *Id*. at 310-311, quoting *Champion v Nation Wide Security, Inc*, 450 Mich 702, 708-709; 545 NW2d 596 (1996).

[10] *Champion*, *supra* at 712.

[11] *Id*.

[12] *Id*. at 312, n 6, quoting Restatement of Agency, 2d, § 219(2)(d).

[13] *Chambers*, *supra* at 311.

[14] *Id*. at 313.

[15] *Id*. at 313, quoting MCL 37.2103(i)(ii).

[16] See, generally *Champion*, *supra* at 705-706 (harasser was in charge of scheduling the plaintiff at work, training her, overseeing her, telling her what to wear, evaluating her, and disciplining her).

her submit to their advances. Thus, the trial court properly granted MDOC summary disposition of this claim.

V. Hostile Work Environment

In order to survive the motion for summary disposition as it concerned her hostile environment claim, Powell had to demonstrate that: (1) she "belonged to a protected group"; (2) she was "subjected" to unwelcome "conduct or communication" because of her sex; (3) the unwelcome conduct or communication, by intent or effect, "substantially" interfered with her "employment or resulted in an intimidating, hostile, or offensive work environment"; and (4) "respondeat superior."[17] To demonstrate respondeat superior, Powell had to show that (1) MDOC had adequate notice of the problem, but failed to remedy it, and (2) that "a continuous or periodic problem existed or a repetition of an episode was likely to occur."[18]

MDOC claimed that Powell did not make out her prima facie case because she provided no evidence of respondeat superior because it lacked adequate notice of the hostile environment. "[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring."[19] Powell claims that seven previous complaints against Stephens and Terry suffice to show that MDOC was aware of the continuing misconduct demonstrated by the two men and should have taken effective action against them long before her complaint arose. However, Powell offered no evidence that, for at least three years before April 29, 1997, Stephens and Terry engaged in conduct of which MDOC should have been aware. Indeed, with the exception of the unsubstantiated 1994 complaint, Stephens had not been reported for improper conduct since 1991, six years before the instant incident. These complaints against the two men over a six-year period was not "substantially pervasive enough" to impute knowledge of it to MDOC.[20] Further, MDOC's prompt and appropriate action in response to its notice of Powell's claim of sexual harassment, relieved it of liability.[21]

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Donald S. Owens

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[17] *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

[18] *Id*. at 395.

[19] *Chambers*, *supra* at 319.

[20] *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 627; 637 NW2d 536 (2001).

[21] See *Radtke*, *supra* at 396.